dipped into a pail (9a, 10a).. The location of these grease spots was fixed by the witness to be "all around that deck," "grease spots on that deck" (10a, 11a).

This witness also stated that at the time of the accident, after all the longshoremen had already returned to their positions following the supper break, at approximately five or ten minutes after 7:00 P. M., when the accident happened, the area was dark (3a, 5a), that "As far as illumination, there was none, there were no lights directed at this particular spot" (7a).

Significantly, this is corroborated by the ship's rough deck log entry made at 8:00 P. M., where is recorded the accident when plaintiff tripped on the "treadle" or sill on the forecastle deck, port side, at about 7:05 P. M., with the admission *"Bulkhead lights out, two. Electrician replaced"* (14a, emphasis supplied).

As regards the starboard passageway, Guarracino testified "it is safer to walk on the port side, because on the starboard side the drafts are coming out of the different hatches" (3a, 4a). He explained this danger by pointing out that the discharge operation was already in progress from all hatches over the inshore or starboard side, as all gangs had preceded the hatch bosses aboard by about 10 to 15 minutes (3a, 4a, 7a), emphasizing that he and the plaintiff had used the port passageway as "We always go on that side, that is a safety measure that we take" (8a). When defendant's counsel suggested the alternative of going alongside the starboard side by the officers' house, the witness intimated there was no permission to go on top of the officers' deck, as "We don't go up there" (8a). He denied any room to pass the winchmen in position in the thwartship passageway shown in Exhibit A (9a).

On page 2 of defendant's brief appears the incorrect statement that the testimony of its witness Purcell, a supercargo clerk, went unchallenged as to the safety of the starboard passageway. On the contrary, this witness admitted during cross examination that he himself used the port passageway during cargo discharge on the starboard side because it was safer (26a).

Sorrentino, a signal man who preceded the hatch bosses before discharge of cargo had commenced, came to the scene of the accident shortly after it occurred and pointed out to a ship's representative that the bulkhead light was out (12a, 13a).

Plaintiff's testimony was substantially in accord with that of Guarracino, stating that at the time of accident the gangs were discharging on the starboard side (16a), that after the accident he observed grease on his clothing (16a), and that the mast lights over No. 2 hatch were about 100 feet away, forty feet up in the air, directed to the hatch itself and the starboard side, without any illumination on the place where he fell (18a, 19a).

Defendant's witness Cerase, head foreman for the work done at the Luckenbach pier, testified that the winches are oiled and greased at least once a day, and that the runners were greased the day before the accident by applying grease from a pail by use of a brush, a couple of brush applications made on the Number 2 winch itself (27a, 28a).

Manner of Happening of Accident:

Guarracino preceded the plaintiff to their gangs already at work in the No. 2 hatch, when "all of a sudden I heard like a thud and a moan. I looked back and Mr. Palermo is on the floor" (4a). The plaintiff was on the ground over the sill, with his feet pointed to it (4a, 5a). This witness was unable to distinguish anything on the deck, par-

ticularly grease spots, for "How could I see if it is dark?" (7a). The port winch near where plaintiff fell had been in use during the day (11a).

Plaintiff testified that he slipped and while attempting to balance himself, tripped over the sill (19a). As he fell the weight of his body went on his outstretched right hand, he being right-handed (16a). As he slipped, he felt "Something smooth, fast" underfoot (16a). The exact words recorded in the ship's log were: "Patsy Palermo, hatch Boss No. 2 after gang tripped and fell, injured right elbow and hand. He tripped on treadle by bridge house" (14a).

Charge of Court and Rulings on Motions to Dismiss:

Defendant complains that the Charge herein did not present its position as regards a non-existent safe alternate passageway, and seeks to assail the verdict on the ground of plaintiff's alleged contributory negligence, though it agreed to a general verdict without special interrogatories as to the extent of such contribution, if any.

That the jury was adequately charged in these respects appears from the Charge as published in defendant's appendix to brief. On page 7a of said appendix there is the following portion of the Charge:

> "• • • Of course, the burden is on the plaintiff to show that he was free from contributory negligence. As I recall, the plaintiff said that he had gone over this passageway before and that he had noted the grease spots. Knowing that, should he have been more careful on his return than he was?
>
> The defendant urges that if the plaintiff knew there were grease spots on the port side in the passageway leading to Hatch 3 (*sic*), why, he should have used the starboard; to which the plaintiff responds that that

would not have been a wise move because the unloading was in progress to the shore, the winches were in operation and that the unobstructed passageway was on the port side."

Immediately thereafter, the learned trial Judge discussed the principle of contributory negligence and its effect on diminishing any recovery.

As regards defendant's complaints referred to the Court's decision not to disturb the verdict, it is clear that the basis of said decision was the Court's appreciation of the substantial evidence to support the verdict, that plaintiff was "very seriously injured," conceding that though the Court's award might have been less than that given by the jury, nonetheless plaintiff herein sought and obtained the fair verdict of the jury. In its opinion the Court below observed as follows:

"It is not for the court to determine by mathematical formula the elements that are involved in pain and suffering, and nature and extent of injury; and the prognosis of the doctors of permanent disability was apparently received by the jury with full effect" (p. 12a of defendant's appendix).

There is incorporated by reference in this opinion the analysis of cases in point set forth in the *Selock* memorandum opinion, also found in defendant's appendix on pages 13a and 14a.

Evidence of Injuries and Damages Flowing Therefrom:

At the time of the accident plaintiff was 45 years of age (14a), earning between $75.00 to $100.00 a week at an hourly rate of $2.25, and $4.00 an hour for overtime. He had not worked since the date of the accident (15a, 17a).

Now he must eat with his left hand, undergoing the helplessness and humiliation of having others cut his food and put on his clothing (18a). His pain is steady, primarily by reason of a screw in his elbow, his fingers don't completely close, and he has a weakened grip (18a).

The Columbus Hospital record discloses plaintiff sustained "fracture and dislocation, comminuted, extensive of right elbow involving olecranon, and upper shaft and coronoid process and head of upper shaft of radius" (17a). In addition, there is noted several small shaft fragments in the elbow, and irregularity of the head of the radius, and a posterior lateral dislocation at the elbow joint.

Dr. Mario F. Tagliagambe, the surgeon who operated for 3 hours to unsuccessfully reduce the fractures, testified that additionally "there were a lot of joint disruptions, both in ligaments and capsule form," a great deal of fluid in the elbow joint, and there was inserted permanently two screws and one circular wire (20a, 21a, 22a). After discussing the deformity with marked restriction, atrophy, "very little flexion and very little extension from this fixed position," with the failure of the operation to allow a maintenance of a proper position, the doctor concluded that the extremity is almost ankylosed by reason of bony block and soft tissue block, so that he has close to the 100 per cent level of permanent disability preventing him from ever returning to his work as a longshoreman, regardless of any arthrodesis operation that may subsequently be performed (22a, 23a, 24a).

Dr. David J. Graubard, another medical witness for the plaintiff, described plaintiff's condition and stated that at the time of trial, thirteen months since the accident, "there has been no union, no callus, and the thing has refused to heal," demonstrating "a complete destruction of the entire elbow joint with a loss of the head of the radius here (in-

dicating), and with the destruction of the ulna" (24a, 25a). He described the arm as "absolutely valueless" with "100 per cent loss of function of the entire right upper extremity —and this man is right-handed" (25a).

Though plaintiff had been examined by a Dr. Balensweig on behalf of the defendant, said doctor was not called to offer any medical testimony to contradict plaintiff's medical experts (28a). In fact, defendant's trial counsel admitted in summation that the plaintiff "did have a bad break," and that there is no serious dispute about the arm (28a, 29a).

In his computation of lost earnings on an extremely low basis of $1,400.00 a year (though plaintiff was earning between $75.00 to $100.00 a week at the time of the accident), an aspect of special damages alone, defendant's trial counsel came to the figure of $22,000.00 on the 3 per cent table (29a).

POINT I

As the record read in the light of findings favoring plaintiff discloses unseaworthiness and negligence proximately related to his severe and permanent injuries, comprising risks he did not assume and could not reasonably avoid, it follows that the verdict herein properly imposes liability on the shipowner-appellant.

There is ample and substantial evidence to support the jury's verdict and the decision by Honorable Clarence G. Galston that it be undisturbed.

The shipowner's obligation to provide a seaworthy vessel and a safe place for a longshoreman to proceed thereon to his place of work has been substantially breached in several major respects herein. First, the presence of grease on the passageway, caused by the frequency and manner of ap-

plying this substance to the winch drum and runners close to the place of the accident, and secondly, the failure to provide sufficient and adequate illumination in the area whereat this condition was caused and allowed to exist, compounded by an obscure three inch elevation across the passageway, have all been proven and were accepted as true by the finders of facts.

That plaintiff had used this passageway on prior occasions is no excuse for the shipowner's breach of its nondelegable and continuing duty to provide a seaworthy passageway for its business invitee. In *Troupe* v. *Chicago, Duluth Transit Co.*, 234 F. (2d) 253 (C. C. A. 2d, June 1, 1956), this learned Court held that an action for unseaworthiness and negligence might be resolved from a factual situation where a stewardess slipped on a worn and wet stairway, though she admitted "she had used the same and identical steps many times over six previous seasons and that she had safely negotiated them several times on the day of the accident."

As to the equal application of the warranty of seaworthiness to business invitees and seamen, which defendant disputes in its discussion of the meaning of *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, we need merely refer to the recent decisions of the United States Supreme Court in *Pope & Talbot* v. *Hawn*, 346 U. S. 406 and this Court in *Amador* v. *A/S J. Ludwig Mowinckels*, 224 F. (2d) 437.

The warranty was extended to a carpenter in the *Hawn* case, who fell through a hidden opening, and was explained in the majority decision as follows:

> "His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of the seamen who had been or were about to go on a voyage. All were sub-

jected to the same danger. All were entitled to like treatment under law."

In the *Amador* case, this Court discussed the warranty applying to longshoremen as follows:

"Unless we have misunderstood the doctrine, the situation as to the ship's liability is precisely as though the crew had been discharging the strips."

This was held to be in accordance with the principle enunciated in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, defined in *Amador* to mean that "longshoremen discharging a ship are in the same position vis-a-vis the ship as members of her crew • • • " (p. 440 of 224 F. (2d)).

As fundamental are the propositions that the absence of illumination, and the presence of a foreign and slippery substance, proximately related to injuries sustained by a longshoreman, necessarily invokes the warranty.

As regards illumination, see:

Brabazon v. *Belships Co.*, 202 F. (2d) 904;
Crawford v. *Pope & Talbot, Inc.*, 206 F. (2d) 784;
Mollica v. *Compania-Sud-Americana De Vapores*, 202 F. (2d) 25;
The Wearpool, 112 F. (2d) 245;
Foster v. *Moore-McCormack Lines*, 131 F. (2d) 907;
Lo Bue v. *U. S. A.*, 75 F. Supp. 154;
Osnovitz v. *U. S. A.*, 103 F. Supp. 238.

As regards a foreign substance on the deck, see:

Troupe v. *Chicago, Duluth Transit Co.*, *supra*;
Poignant v. *United States*, 225 F. (2d) 595;
Lauro v. *U. S. A.*, 162 F. (2d) 32, 34.

The law is also clear that a business invitee does not assume the risk of an unsafe place to work, even when apparent:

Socony-Vacuum Oil Co. v. *Smith, supra;*
Beadle v. *Spencer*, 298 U. S. 124;
Vanderlinden v. *Lorenzten*, 139 F. (2d) 995;
Grillea v. *U. S. A. et ano.*, 232 F. (2d) 919.

The foregoing cases hold that the shipowner's obligation to furnish a safe and seaworthy vessel is continuing and non-delegable, and prompts liability regardless of knowledge of the danger by the injured person.

If there be an alternative safe passageway, then the doctrine of comparative negligence is applied to reduce the recovery to the extent of such contribution. The facts in the instant case disclose that in fact there was no alternative *safe* passageway, and further, the trial Judge favored defendant by charging that the burden to prove freedom from contributory negligence would be on the plaintiff. (See page 7a of appellant's appendix to its brief.)

Defendant's hindsight attempt to blame plaintiff for not using the thwartship passageway, assumedly by proceeding on the port side past No. 3 hatch to the after side of the house, and then thwartships to the starboard side, and thence forward to the starboard aft portion of No. 2 hatch, ignores two obvious truths: 1. Once past the house on the starboard forward side, the discharge operations and attendant dangers were in effect at No. 2 hatch. Reasonable foreseeability dictated use of the port passageway, a safety measure admitted even by defendant's witness Purcell. 2. The route proposed by defendant was in fact not ever used by any of the longshoremen at any time during the two days the vessel was worked by them.

An extreme situation was presented to this Court in *Guerrini* v. *United States*, 167 F. (2d) 352, solely on the issue of negligence involving notice, and not unseaworthiness, when an employee of a sub-contractor hired to clean boilers slipped on a patch of grease. The Court considered that even though libelant "must have been either totally indifferent to any possibility of danger, or have paid no attention whatever to his footing" by choosing to stand on the patch of grease, he might nonetheless recover damages after a proper deduction for contributory negligence is made.

The instant case is quite different. Here, the issue of contributory negligence was presented to the jury, and its general verdict must be deemed to have encompassed any deduction that should have been made. Further, the state of facts here, as compared with *Guerrini, supra*, clearly shows that the contributory negligence of the plaintiff, if any, must be minimal indeed by reason of his reasonable use of the port passageway under circumstances where the starboard passageway presented obvious dangers attendant on cargo discharge.

Defendant errs in contending that the issue of contributory negligence predicated on a choice between an "obviously safe passageway" and one that is unsafe was not properly presented to the jury by the Charge below. The excerpt from said Charge, *supra*, sufficiently answers such contention.

The cases cited by defendant in its brief are not in point. They concern in the main the maritime law of several decades past, and situations on land and aboard ship where "obviously safe" alternate ways were provided.

In the 1932 case of *Holm* v. *Cities Service Transp. Co.*, 60 F. (2d) 721, concerning an action for negligence alone,

the Court recognized that "Though somewhat greasy decks were necessarily concomitant to loading, this did not do away with the duty of the defendant to use whatever care was required to prevent excessive accumulations of oil in places where they would be dangerous to a person rightfully using the deck" (p. 722 of 60 F. (2)). The reversal was predicated on the fact that plaintiff was free to choose between "what is safe and what is known to him to be dangerous," while off duty and going for a drink of water.

The rationale above runs through the cases cited by defendant in its brief, and has no application to the state of facts with which we are here concerned. Here the shipowner knew or should have known of the use of the port passageway by the hatch bosses during the two days of cargo discharge on the starboard side.

In the case of *Lynch* v. *United States*, 163 F. (2d) 97, an action in Admiralty consequent on the death of an electrician's helper who fell through an unlighted open hatch, the concurring opinion of L. Hand included the following:

> "If the course which Lynch actually took was one which the shipowner might have supposed an employee would take, and, if reasonable care would have detected the absence of the hatch cover, I should hold that liability was established" (p. 99 of 163 F. (2d)).

Where this principle did not apply to Lynch, it most certainly applies here. This is emphasized by the fact that unseaworthiness does not require notice, and that defendant's own supercargo clerk, Purcell, as well as the hatch bosses necessarily used the port passageway the entire day during cargo operations on the starboard side.

There is no need to further discuss the cases cited by defendant on the proposition it advances of an alternative

safe passageway when, in fact, the jury concluded there was no such alternative. Defendant misconceives and misstates the basic issue herein and ignores probative facts in the record that support the verdict, and seeks acceptance of its version on testimony that was resolved by the fact finding body in favor of the plaintiff.

POINT II

The trial judge necessarily and properly refused to disturb the verdict predicated on an uncontroverted permanent disability and grievous special and general damages flowing therefrom.

Defendant's Point II erroneously contends that the experienced trial Judge, Hon. Clarence G. Galston, refused to disturb the verdict because "the Court misconceived its power, and its correlative duty." Where the opinion states that the verdict would be set aside only if "it can be demonstrated that there was no substantial evidence to support the verdict," how can defendant argue on page 13 of its brief that this is error where the opinion clearly sets forth the basis of grievous injuries and permanent damages that substantially support the verdict?

It is axiomatic that a jury verdict is at least as unassailable on questions of fact involving damages as where the Court alone sits as a fact finder. The rule is expressed by the U. S. Supreme Court in *Lavender* v. *Kurn*, 327 U. S. 645, 653, as follows:

> "Only where there is complete absence of probative facts to support the conclusion reached does a reversible error appear."

In a recent decision by this Court in *Marino et ano.* v. *United States of America*, 234 F. (2) 317 (C. C. A. 2d,

June 6, 1956), concerning an appeal on alleged excessive damages awarded by a trial Judge, the *per curiam* opinion states as follows:

> "Had the award been made by a jury with an eye to equities, rather than upon the black and white of strict findings pro and con, probably no one would question the result. While the judge did not have that freedom, we think he has well buttressed his result in his meticulous opinion, and that the ends of justice will not be served by upsetting what he has done" (p. 318 of 234 F. (2)).

The opinion below, as well as the one incorporated by reference and found in defendant's appendix, clearly demonstrate that the Court below properly understood its power to exercise discretion, and in the exercise thereof refused to disturb the strongly substantiated verdict herein.

There is no need to repeat the injuries set forth under Statement of Facts in this brief. Defendant's trial counsel in summation conceded their seriousness, and in fact did not present any medical testimony to raise doubt, even if that would matter on appeal once such doubt had been resolved by the jury. The prospective lost earnings consequent on the injuries, as calculated by defendant's trial counsel on extremely low figures which he advanced as indicative of plaintiff's annual past earnings, ignoring his earnings in the recent past, would compel an opinion that the total verdict, which included damages for pain and suffering, humiliation, inability to ever again engage in normal activities of a man without the useless appendage, etc., was less than adequate.

This Court has held that it would not disregard a jury's verdict merely because the Court might have reached a different conclusion on the facts. *Hughes* v. *Lawyers Trust*

Company, 108 F. (2d) 792, cert. den. 310 U. S. 647, 60 S. Ct. 1097.

In accord:

Galeota v. *U. S. Gypsum Co.*, 123 F. (2d) 947, cert. den. 315 U. S. 813, 62 S. Ct. 798;
Davis v. *Schwartz*, 155 U. S. 631;
Barlow v. *Pan Atlantic S. S. Corp.*, 101 F. (2d) 697.

CONCLUSION

Defendant-Appellant asks this learned Court to again resolve a conflict on facts that has already been resolved by a proper body of jurors. An eminently experienced trial Judge has corroborated and refused to disturb their unanimous deliberations that were resolved into a properly grounded verdict.

As the evidence amply supports the jury's verdict, and there was no error in the Court's instructions to said jury, nor in his decision on defendant's motions, it is respectfully urged that the judgment herein be affirmed, with costs.

Respectfully submitted,

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ROBERT KLONSKY and
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Of Counsel and On Brief

APPENDIX

UNITED STATES COURT OF APPEALS

For the Second Circuit

Pasquale Palermo,

Plaintiff-Appellee,

—against—

Luckenbach Steamship Company, Inc.,

Defendant-Appellant.

Excerpts From Testimony

—14—

• • • • •

Jerry Guarracino, having been first duly sworn, testified as follows:

Direct Examination by Mr. Klonsky:

Q. Mr. Guarracino, is that your name, sir? A. Yes, sir.

Q. Where do you live? A. 127 Second Avenue, New York.

Q. What do you do for a living when you work? A. Longshore.

Q. And by whom are you employed as a longshoreman? A. Turner & Blanchard.

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Q. Now, do you work for Turner & Blanchard at any particular pier? A. Yes, sir.

Q. What pier is that? A. Pier 135, foot of 35th Street.

Q. How long have you been a hatch foreman at that pier? A. About six years.

Q. And you have worked steadily for Turner & Blanchard? A. Yes, sir.

Q. And do you know whether or not Turner & Blanchard does the exclusive stevedoring work for the Luckenbach Steamship Company? A. Yes, sir.

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Q. How many gangs were in the No. 2 hatch on that day? A. Two gangs.

Q. In other words, you were the hatch foreman of the gang in No. 2 hatch forward? A. That is right.

Q. Who was the hatch foreman for the No. 2 hatch aft? A. This Pasquale Palermo.

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Q. Now, this vessel, do you recall which side she was moored to the pier? A. The starboard side.

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Q. Now, as you walk along this passageway towards the No. 2 hatch on the port side, how close is the left side of your body to that winch drum that is seen in one of those pictures? A. How close?

Q. Yes. A. Oh, I would say a foot or so.

Q. About a foot or so? A. Yes.

Q. And how close is that winch drum to the sill? Do you

—26—

know what that sill is, the raised area from the deck over which one has to step to go to the forward part, how far is

that winch drum from that sill? A. Well, that sill is in front of the winch.

Q. Yes? A. It is parallel with the end of the winch.

Q. It is the ending of the winch? A. That is right, in other words, it is the enclosure where they have got that winch.

* * * * *

Q. Now, you say you left with your gang and all of the gangs at 6:00 p. m. for supper? A. That is correct.

Q. What time did you return? A. At 7:00 the whistle blows, at five minutes to 7:00, and they all start walking up on the ship.

Q. I see, now— A. In rotation.

Q. Did your men get on the ship before you? A. Yes, sir, they always do.

Q. In other word , you have some business to do on the dock with your dock men? A. All hatch bosses stay on the dock until the men go up on the ship.

Q. And is the discharge operation, is that taking place on the in-shore side into the dock? A. Yes, sir.

Q. In other words, the slings, the booms, the cables are all working the off-shore side—the in-shore side? A. They are working on the starboard side.

Q. They are working on the starboard side? A. That is correct, on the right side of the ship.

Q. So when you came on the ship after the men had started working in the discharging of the cargo, which side of the ship did you walk on to go to your hatch? A. On the left side, the port side.

Q. Why did you go to the port side instead of the starboard? A. It is safer to walk on the port side, because on

the starboard side the drafts are coming out of the different hatches.

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Q. And as you were walking forward, after having come up this ladder, port side, about how far behind you was Mr. Palermo? A. Oh, a few feet, I would say.

Q. Now, about what time would you say this was when you had reached the area where the accident happened? A. Well, I would say between about ten minutes after seven, five to ten minutes after seven. It takes us about five minutes or eight minutes to get up there.

Q. Were the men already working on the ship? A. Yes, they were already working.

Q. I see. Now, did you see the accident? A. No, sir.

Q. Did you hear when Mr. Palermo fell? A. Yes, sir.

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Q. Yes? A. Steps. We will say that is an iron ladder. Well, I am walking towards my end, the forward end, and Mr. Palermo is in the back of me. All of a sudden I heard like a thud and a moan. I looked back and Mr. Palermo is on the floor.

I said, "What is the matter with you, what happened?"

Q. All right. Now I show you Plaintiff's Exhibit 3 in evidence and give you a pen, and I ask you to put the word "P" for Palermo, as to where you saw him on the floor.

(The witness did as requested.)

A. He was half inside this here enclosure, his body was inside this enclosure (indicating).

Mr. Klonsky: May I show this to the jury without passing it to them?

The Court: Yes.

Mr. Klonsky: Here is where this letter "P" is (indicating).

Can you all see this?

The "P" stands for Palermo, and it is on the forward side of this sill (indicating).

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Q. Where, where were his feet? A. Aft.

Q. Towards the sill? A. That is right.

Q. And at 7:00 p. m. was the sun down or was it dark? A. Well, at that time of the year it is always dark.

Q. At 7:00 p. m.? A. Yes, at 7:00 p. m.

Q. Could you tell us what you observed about the lighting conditions at the place where Mr. Palermo fell? A. Well, at that particular time I didn't observe nothing, it was dark.

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Q. Now, I show you Plaintiff's Exhibit 3 in evidence where on the officers' quarters there is a bulb enclosed by some steel indicating a light fixture; do you see that? A. Yes.

Q. Was this on or was that off at the time this man fell? A. To my recollection it was off.

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* * * * *

Q. In daylight while you were there, before 6:00 p. m., did you observe the condition of the after part of this sill? A. What do you mean?

Q. The condition of the floor or deck? A. You mean—

Q. Do you know what I mean by the aft part of the sill, before you get to the sill, as you are walking towards your hatch, did you have occasion to observe the condition of the deck during the daylight hours? A. With reference to what, the walking conditions?

Q. Yes, where you were walking? A. Well, naturally there are spots of grease and oil because they always oil them winches.

Q. You mean it is right near the winches? A. All the time, naturally.

Q. Did you see spots of grease and oil there before 6:00 p. m. on that day? A. Well, to my recollection I think I did.

Q. And while you were on this ship, is that your best recollection? A. Yes, sir.

* * * * *

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Q. Who oils and greases the winches? A. Oh, they have a deck man.

Q. A member of the crew of that ship? A. Yes, a crewman.

Q. And they oil and grease the winches, do they? A. Yes.

Q. Longshoremen don't oil and grease those winches, do they? A. No, no, sir, they don't have no business whatsoever.

Jerry Guarracino—for Plaintiff—Cross

Q. Now, this sill that we have here in Plaintiff's Exhibit 3 in evidence, could you give us your best approximation as to how high it is above the deck? A. I would say about three inches.

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Q. Do any of these lights down the hatch or on top of the mast itself illuminate the hatch itself?

Mr. Underwood: I object to the form.
The Court: I sustain the objection.

Q. Could you tell us whether there was any illumination directed to this area where Mr. Palermo fell?

Mr. Underwood: Your Honor, I object to the form of the question. Let him ask him what he saw.
The Court: I overrule the objection.

A. As far as illumination, there was none, there were no lights directed at this particular spot.

Q. At the time that he fell, were you able to see the grease spots on the floor with your own eyes? A. No, sir.

Q. Why couldn't you see it then? A. How can I see if it is dark?

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Cross Examination by Mr. Underwood:

Q. When you came back at a little after seven, had your gang preceded you? A. Yes, sir.

Jerry Guarracino—for Plaintiff—Cross

Q. And had Mr. Palermo's gang preceded him? A. Yes, sir.

Q. How about the gangs that were working in No. 3 and No. 4; had they begun to work also? A. Yes, sir.

Q. And as you went forward on the port side of the ship, the ship was working, was being discharged, was she? A. That is correct, sir.

Q. And you went forward on the port side because of the drafts that were there? A. We always go on that side, that is a safety measure that we take.

* * * * *

—44—

Q. Well then, you don't know which side they went up; is that right? A. As a rule we all go up on the port side. We never go towards the winches. Only when the winches are not working—

Q. Do you know— A. Some of the gangs—excuse me—some of the gangs that go up, the first gangs, when they get up they can go up on any side because there is no hatch working, so there is no chance of them getting hurt with a draft coming in or out. Do you get the point? A. Yes, I think I do, thank you.

Q. When you were walking across the forecastle deck after you got up the ladder, and until you came to the point where Mr. Palermo fell, there wasn't any danger of your being hit by a draft then, was there? A. No, sir.

Q. That would be true on the starboard side too, would it not, in that area alongside the officers' house, the drafts don't go there, do they? A. Not on top of the officers' deck, no.

Q. On neither side, port nor starboard. A. We don't go up there.

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Q. Isn't it quite possible, is it not, for a man who wants to do so, after climbing up that ladder to go across to the starboard side on that place called the passageway on Exhibit A? A. Is it possible? The two winchmen have to get out of the way. In other words, there is no room for anybody else to pass if these two men are working them winches.

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A. As a rule I see them oiling them winches because you have to oil them runners, otherwise they don't operate right.

Q. You didn't see anybody oiling them that day? A. Not that particular day.

Q. Or the day before? A. The day before I did.

Q. You had the previous day?

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You see, when these ships come in, these runners are all rusty from the sea voyage, and if you don't oil them they don't operate right, they catch.

Q. I want you to tell me, please, what you saw the man do when you saw him do it. A. Some of them, they have got—

Q. Not what some of them have, but what you saw this one.

You say you saw one the day before the accident? A. They have a pail with grease, oil, they call it.

They dip it, they dip it on—I would say it is like a mop only it ain't as big, it is about seven or eight inches—

Q. Like a sink mop? A. Something like that.

They dip into the pail and they run it across the drum.

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Q. I see. Where they put the oil, where the oil is, it is on that part of the runner that is on the drum? A. On the drum itself, that is correct, sir.

Q. Yes, yes. And did you see him do anything else? A. Well, they come around and they oil the different parts of the winches. They grease it, rather. They have got grease guns, and they grease the different mechanical parts of the winch. They have got to grease them all day long.

Q. Like you might use it on an automobile? A. That is correct, sir.

Q. Now, that grease is squirted by a gun on some bearings or something in the operating part of the winch? A. That is correct, sir.

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Q. Well, I am asking you to describe it in the best way you can.

Is it sort of medium thick and medium then? A. It is enough for them to fall off this mop that I was telling you about. You understand, they use it. In other words, they use it like you would use a paint.

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Q. Now, getting back to my earlier question, I would like to have you tell me, if you will, where these grease spots began. A. They are all around that deck, sir.

Q. Over the entire passageway from the after ladder to

the sill? A. There were some on one side there, they were all over there, I couldn't exactly say how deep it was, but there was grease spots on that deck.

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Q. Do you say that there was any light in the area where Mr. Palermo fell, the immediate area where he fell that was not burning? A. There was no light there, no, sir.

Q. Do you mean, well, when I use the word "light," now, I am talking about a light fixture, a gadget with a light bulb in it.

Do you say that there was a light fixture there that didn't have a light that was burning in it? A. That is correct, sir.

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Redirect Examination by Mr. Klonsky:

Q. And on the port winches, particularly the winch which

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was right near where Mr. Palermo fell, was that in use during the day? A. Positively, they were discharging cargo.

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ANIELLO SORRENTINO, having been first duly sworn, testified as follows:

Direct Examination by Mr. Klonsky:

Q. Mr. Sorrentino, sit down, please.

Where do you live, please? A. 1653 - 68th Street, Brooklyn.

Q. And what do you do for a living? A. Longshoreman.

Q. Now, on February 16, 1955, were you employed as a longshoreman by Turner & Blanchard? A. That is right.

Q. And who was your hatch boss? A. Patsy Palermo.

Q. Mr. Palermo? A. That is right.

Q. The plaintiff in this case? A. That is right.

Q. And were you working on the Marine Snapper on that day with his gang? A. Yes, sir.

Q. What was your job in the gang? A. I was the gangway man, the signal man.

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Q. Now, did you see the accident to Mr. Palermo on that day? A. No.

The Court: What?

The Witness: No.

Q. Were you on the other side of the ship; is that right? A. That is right.

Q. On this day, was it the first or the second day of work on this ship? A. The second day.

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Q. Now, did you go and look at the area where this accident happened afterwards? A. Not right away, but a few minutes after.

Q. You went to the place on the port side? A. That is right.

Q. What did you see there? A. At that time one of the men from the company came over and he asked me the question because that is routine—

Q. What did you see?

Mr. Underwood: Your Honor, I am trying to understand the last answer.

The Court: You will have to speak up and distinctly, we don't understand you.

Now read what he said.

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(Previous question and answer read.)

The Court: One of the men of the company, do you mean of the ship's company?

The Witness: From the ship company, yes.

The Court: He asked you something?

The Witness: Yes.

I went over on the other side and I show him the light was burned out, that particular light that you just said before.

Q. The light was burned out? A. I pointed to the light, that light was burned out, and I said, "The man falls over here, but I don't see him fall over here because Jerry went for his own business and I went back to my own business discharging the ship."

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Mr. Klonsky: All right, sir.

This entry comes from the rough deck log of the ship, and it is as of 2000, which we have stipulated means—

Mr. Underwood: 8:00 p.m.

Mr. Klonsky: 8:00 p.m.

"Timekeeper from Turner & Blanchard reports that about 1905"—

Mr. Underwood: 7:05.

Mr. Klonsky: (Continuing) —"Patsy Palermo,

—87—

hatch boss No. 2 after gang tripped and fell, injured right elbow and hand. Accident occurred on forecastle deck, port side. He tripped on treadle by bridge house. Inspected same. All clear on deck, no grease. Bulkhead lights out, two. Electrician replaced."

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PASQUALE PALERMO, having been first duly sworn, testified as follows:

Direct Examination by Mr. Klonsky:

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Mr. Palermo, when were you born and where were you born? A. I was born in Italy, August 19, 1911.

Q. So in 1955 you were about 44 years of age; is that right? A. 45.

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Q. And what were your earnings each week at the time this accident happened? A. From $75 to $100, $110.

Q. Between $75 and $100 a week? A. About that.

Q. Do you know what your hourly earnings were, about how much you got an hour? A. I think $2.25.

Q. $2.25? A. Yes.

Q. Did you get extra for overtime? A. Yes, sir.

Q. If you worked after 6:00 o'clock, did you get overtime? A. Yes, sir, it is almost $4 an hour for overtime.

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Q. Now, these lights that are permanently with the ship, do you know what I mean, on the walls of the ship— A. Yes, sir.

Q. Do the longshoremen have anything to do with replacing bulbs or seeing that those lights are running? A. No, sir.

Q. Who puts those lights on and who puts those lights off, do you know? A. The crew.

Q. The crew? A. Yes, the electrician.

Q. The longshoremen have anything to do with the permanent lights? A. No, sir.

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Q. Do you know how much time ahead of you they were? A. Well, it is about four or five minutes because I was talking with one man on the way up, one man who used to be down the hold, I was talking with this man while I was going up the gangway. Then I met Jerry on deck. I was

talking about the work, and then we went up to the No. 2 hatch.

Q. In other words, it was about four or five minutes before you came? A. Yes.

Q. And your gang had already gone on the ship from supper? A. Oh, yes, yes.

Q. And were some of these hatches already unloading at

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the time you were coming on the ship? A. Yes, sir.

Q. And they were unloading on the starboard side? A. On the starboard side, yes, sir.

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Q. When your foot or feet started slipping, will you please describe for the Court and jury how it felt to you? A. Something smooth, fast.

Q. I see. After the accident, did you have an opportunity to look at your shoes and your pants? A. Yes, in the doctor's office.

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Q. What did you see? A. It was soiled, I made it dirty, the floor there.

Q. What was on your shoes? A. Grease.

Q. Grease? A. Black.

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Q. In other words, the weight of your fall went on your right hand? A. Yes, the weight of the fall on the right hand.

Q. Are you a right-handed man ordinarily? A. Yes, sir.

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Q. Have you ever done any work since the day of this accident? A. No.

Q. That is since February of 1955? A. No, sir.

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Mr. Klonsky: I had just started reading the Columbus Hospital record with respect to Pasquale Palermo who was admitted to this hospital on February 17, 1955, at about 1 p.m., and discharged February 25th at 3:50 with the diagnosis of fracture and dislocation, comminuted, extensive of right elbow involving olecranon, and upper shaft and coronoid process and head of upper shaft of radius.

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"There is a markedly comminuted fracture of the right olecranon with some separation of the fragments. The fracture involves the main portion of the olecranon and the adjacent shaft of the ulna. There are also several small shaft fragments at the anterior aspect of the elbow which are apparently from the coronoid process. There is also irregularity of the head of the radius due to a compression fracture. In addition, there is posterior lateral dislocation at the elbow joint.

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Q. Since the accident and up to the present day, Mr. Palermo, how do you eat? A. With the left hand.

Q. Who cuts your meat and prepares your food for you? A. My son and my daughter and wife.

Q. They cut the meat for you? A. Yes.

Q. Who ties your tie for you in the morning? A. My daughter.

Q. Who dresses you? A. I dress roughly, I can dress—

Q. You can dress yourself roughly? A. Roughly, yes, sir.

Q. Well, when you dress, how do you get your pants on? A. Well, when I lift the pants, somebody is holding on this side (indicating).

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Q. Could you tell the Court and jury in your own words what you felt in this hand from the day you came to the hospital until the present day? Well, explain the feelings, that is important. A. It is pretty hard, it is sometimes painful, and sometimes you forget, you move the arm and because there is a screw inside—

Q. You have a screw in your elbow? A. Yes, so if I put it on the table like that, it hurts. It is a steady pain. If I lift my hand up like this, it feels heavy, I can't hold it up.

Q. How is your grip in your right hand, do you have any grip, any strength? Is it as strong as your left hand? A. The fingers no close over here (indicating):

Q. The fingers don't close all the way? A. Yes, sir.

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Q. Now, at the time the accident occurred, were there mast lights above the No. 2 hatch? A. Yes, sir.

Q. If you walked from the place where you fell to the mast where these lights were located, about how far was it? A. About a hundred feet.

Q. And if you went from the bottom of the mast up to where the lights were, how many feet would that be? A. Forty.

Q. About forty feet? A. Yes.

Q. Now, can you tell us which way these mast lights were directed? A. One directed straight down the hatch, the other one is on the starboard side.

Q. There are two mast lights there? A. Yes, sir.

Q. One was directed down the hold where the hold men were working, and the other to the starboard side where the gangway men and the dock was located? A. Yes, sir.

Q. Did any of that light come to the place where you fell? A. It was too far away.

Q. Was there any illumination at all where you were walking? A. No, sir.

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Cross Examination by Mr. Underwood:

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Q. And in this process of slipping and then tripping over the sill and falling, you only took one or two steps? A. Steps, yes, sir.

Q. So that you remember initially your first slip was within two or three feet of the sill; is that right? A. Yes, that is right.

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Q. You could pass on the starboard side? A. Well, it is almost against the rules to pass there while the ship was working.

Q. But you could pass on the starboard side? A. Yes, if I wanted to, yes.

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MARIO F. TAGLIAGAMBE, called as a witness on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination by Mr. Klonsky:

Q. Are you a regularly licensed medical practitioner in the State of New York? A. I am.

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Q. So both the ulna and the radius were involved in these fractures; is that right? A. That is correct.

Q. The two bones of the forearm? A. That is correct.

Q. And also the olecranon process itself, which is right here at the elbow joint? A. That is right.

Q. Is that right? A. Yes.

Q. Will you continue, Doctor? A. In addition, there was a posterior lateral dislocation at the elbow joint.

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A. That constitutes the essential part of the bone pathology. Of course, there were a lot of joint disruptions, both in ligaments and capsule form. At the elbow joint, there was a great deal of collection of fluid, within the elbow joint.

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Q. How much of an area was cut open, would you say,

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altogether? A. By meausurement I would say approximately eight or nine inches; I don't know exactly.

Q. You opened it up so that you could get to the bone? A. So you could expose the entire open joint.

Q. When you are doing that, you are cutting ligaments and muscles— A. Skin, subcutaneous fascia, muscles, ligament, capsule and so forth.

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Q. By that you mean the extensive number of fragments of bone? A. That is correct.

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The problem there was not only to put them back in place, but to maintain the proper position of the bones. It was hard to fix in a manner so that they would be stable and maintain them in position.

An attempt was made, however, to fix those bones in the proper position by means of wire and by means of screws.

Q. How much wire and how many screws did you put into that elbow? A. If my memory serves me right, there were two screws inserted and one circular wire. The head of the—no, that is all, sir, I remember extracting that.

Q. After you did that, after you inserted the screws and the wire, were they meant to be there permanently? A. Yes, sir.

Q. What did you do after that? A. After that we put a large anterio-posterior molded plaster splint.

Q. Didn't you stitch him up? A. Oh, yes, of course.

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Q. About how long did that operation take? A. It took approximately three hours, sir.

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Q. How long a period of time after that did you treat him for this disability? A. Well, the patient still hasn't been discharged from care. He comes in for checkups, he is still reporting.

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Q. Would you please describe the condition of his forearm, of the right upper extremity as of now? A. The operative scar is clean and well healed. There is residual deformity in the right elbow joint associated with marked restriction of motion at the elbow joint.

There is a weakness in the hand grasp.

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There are secondary atrophy or atrophitic changes noted both in the arm, the forearm and hand.

There is a certain type deformity more specifically known as a varus deformity.

That is about the essential condition now, sir.

Q. Doctor, you speak of a marked restriction in the elbow joint. When we talk about the elbow joint itself, this is that (indicating); is that right? A. That is right.

Q. To what extent is this restricted? A. Well, it was very markedly restricted and the deformity referred to was of a certain type which in this particular case is not in an optimum position.

There is very little flexion and very little extension from this fixed point (indicating).

Q. In other words, it is almost ankylosed; is that right? A. Yes, sir.

Q. In other words, as if he had one bone running all the way down without a joint? A. In a fashion, yes.

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Q. What has happened to the bone that you say has made it worse, have they become osteoporotic? A. Two things have happened: No. 1, the position that we attempted to maintain was not maintained, that is, as a result of the fixation attempted.

No. 2, in this case there were some myositic ossificans, changes, that is changes—some ossification has taken place in the muscles around the elbow joint as a result of the extensive injury and hemorrhages into that area which in itself can account for a great deal of this marked restriction that is present.

Q. I see. A. In other words, there is a combination of bony block and soft tissue block as the result of these pathological changes which have been described.

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Q. This arthrodesis you are talking about would require another operation where you would break the bones that are locking the elbow joint now, and replacing the bones in such a way so he could move his arm, but they would be immobile again for the rest of his life at that position; isn't that right? A. That is correct, sir.

Q. It would have a beneficent effect with respect to his necessities? A. That is correct.

Q. Will he ever be able to use this extremity, regardless of what operation you give him, to work manually? A. No.

Q. Will he be able to return to his work as a longshoreman where you have to climb ladders and handle things?

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A. No, sir.

Q. This disability is permanent? A. Yes, sir.

Q. And is it competently produced by an accident of falling forward right on that right hand? A. Yes, sir.

Q. And, Doctor, what percentage of that right upper extremity is affected by his condition? A. From an industrial point of view, he would have close to the 100 per cent level of industrial use—that is, loss of use of that upper extremity.

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DR. DAVID J. GRAUBARD, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Klonsky:

Q. Dr. Graubard, you are a regularly licensed medical practitioner in the State of New York? A. Yes, sir.

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You will also note there is a screw that has gone through one of the bones to try to hold it into place, and there is also a wire which is this here (indicating), in which an attempt has been made to bring some of the fragments of the bones together, to hold them to heal, but in spite of all

of that, in this area, and this is some thirteen months since the accident, there has been no union, no callus, and the thing has refused to heal.

As a result, you have a complete destruction of the entire elbow joint with a loss of the head of the radius here

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(indicating), and with the destruction of the ulna. As you can see, it has not healed up, and there are still small fragments of bone that can be seen lying in the soft tissues, in the muscles of the arm.

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So, on the basis of my examination, the overall picture, includes the weakness in the wrist, the limitation of motion in the wrist which is due to the destruction of the muscles up in the elbow joint which results in the motor power in the wrist movement being decreased; furthermore, con-

—211—

sidering the limitation of motion of the shoulder, well, the overall picture is that of 100 per cent loss of function of the entire right upper extremity—and this man is right-handed.

Q. Can he ever do any manual work or longshore work, in your opinion, Doctor? A. As he is now?

Q. Yes, as he is now. A. He can't use that arm, it is absolutely valueless.

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EDWARD J. PURCELL, a witness called on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Underwood:

Q. Whom do you work for, Mr. Purcell? A. Luckenbach Steamship Company.

Q. What is the nature of your work? A. I am the ship's clerk when the ship is in port.

Q. You don't go to sea with it? A. No.

Q. Were you acting as super cargo clerk on the Marine Snapper in February of last year when Mr. Palermo was hurt? A. Yes, sir, I was.

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Cross Examination by Mr. Klonsky:

Now, you yourself took the port passageway, did you not, when you came to the ship on other occasions? A. I used it all day long.

Q. You use the port passageway because on the starboard side there are drafts, there are cables, and there is movement; isn't that correct? A. Yes.

Q. And it is safer to use the port side; isn't that right? A. I use the port side, sometimes I have to use the starboard side.

Q. But if you don't have to use the starboard side, it is safer to use the port side; am I right or wrong? A. Yes.

Q. And to use the port side to get to the No. 2 hatch,

was there any other way than this passageway that this plaintiff could have taken? A. Yes.

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ANDREW CERASE, called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. Underwood:

Q. Are you the man they call Shorty? A. That is right.

Q. May I call you that? A. It is o. k.

Q. You work for Turner & Blanchard? A. Yes, sir.

Q. And what kind of work do you do? A. I am assistant foreman—head foreman of the ship.

Q. Where do you work principally? A. Pier, foot of Thirty-fifth Street.

Q. That's the Luckenbach pier? A. Yes.

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Cross Examination by Mr. Klonsky:

Q. How often during the day does a man go around oiling and greasing up these winches? A. Maybe one or two times a day, but at least once. Maybe once, sometimes two times.

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Q. But did you see them the day before grease the runners? A. Yes.

Q. How do they do that? A. Put a little oil and—

Q. Black grease? A. I don't know what the call it. It is oil. You call it, it is just grease.

Q. Did they take a little brush and a pail and they put it on like they were painting something? A. Yes, but not too much. They put it on.

Q. But you don't know how much they put on number 2, do you? A. I see them put a couple of brushes, that's all.

Q. A couple of brushes? A. That is right.

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Mr. Klonsky: Your Honor, we may save time by agreeing to this: That the plaintiff, Mr. Palermo, had been sent for a physical examination by a doctor of his own choice, a Dr. Irwin Balensweig, and the examination took place on behalf of the defendant on March 2, 1966. Dr. Balensweig has not been called by the defendant. That's why I would like the record to show that he was examined on behalf of the defendant. Is that right? Here is the report.

Mr. Underwood: If you will also stipulate that plaintiff was examined by two additional doctors on behalf of himself or Mr. Di Costanzo or the Traveler's Insurance Company.

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SUMMATION OF EUGENE UNDERWOOD

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There isn't any doubt that Mr. Palermo has a bad arm today. It is an unfortunate occurrence, but he did have a bad break. Of course, that is the reason

Extracts from Summation of Eugene Underwood

I didn't call my doctor because there is no serious dispute about the man's arm, but it isn't useless.

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I have done the figuring on the basis of table age 44 at 4 per cent and at 5 per cent, and if you take his earnings at $1,400 a year at 4 per cent, the present value of that much money would be about $20,000; and at 5 per cent, about $18,000. If you take it at 3 per cent, it would be about $22,000.